IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 92552-6

QUINAULT INDIAN NATION, FRIENDS OF GRAYS HARBOR, SIERRA CLUB, GRAYS HARBOR AUDUBON, and CITIZENS FOR A CLEAN HARBOR.
Petitioners,

vs.

CITY OF HOQUAIM, WASHINGTON STATE DEPARTMENT OF ECOLOGY, IMPERIUM TERMINAL SERVICES, LLC, WESTWAY TERMINAL COMPANY, LLC, AND WASHINGTON SHORELINES HEARINGS BOARD,
Respondents.

RESPONSE TO QUINAULT INDIAN NATION, ET AL.'S PETITION FOR REVIEW

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INTRODUCTION

The petition for review by Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively "Quinault") reiterates arguments that have been rejected twice before, most recently by the Court of Appeals—that the Ocean Resources Management Act ("ORMA") was intended to cover land-based facilities merely because those facilities will distribute products to vessels owned, operated, and managed by third-parties.

As the Court of Appeals properly concluded when upholding the decision by the Shorelines Hearings Board, Quinault's novel theory is incompatible with the plain language of regulations that the Department of Ecology ("Ecology") promulgated to implement the bare text of ORMA. Under those regulations, an "ocean use" that triggers review under ORMA does not include land-based terminals, such as those proposed by Westway Terminal Company, LLC ("Westway") and Imperium Terminal Services, LLC ("Imperium"), regardless of whether vessels will call on the terminals. The Court of Appeals deferred to the plain language of Ecology's regulations and offered a straight-forward opinion based on those regulations. This Court should reject Quinault's attempt to expand ORMA beyond the scope of Ecology's regulations and the underlying statute and deny Quinault's petition.

ARGUMENT

I. Quinault's Petition Does Not Merit Review.

Quinault invokes the "substantial public interest" standard in asserting that this Court's discretionary review of the Court of Appeals' decision is warranted. Petition at 2 (citing RAP 13.4(b)(4)). The criteria governing that standard, which Quinault does not evaluate, are not met here: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination that will provide future guidance to public officers; and (3) the likelihood that the question will recur. *In re Silva*, 166 Wn.2d 133, 137 n.1 (2009) (citation omitted).

Quinault's petition offers an interpretation of ORMA that has never been applied in the twenty-six years since the statute was adopted. As a result, there is no reason to believe that this issue will recur. Moreover, Quinault's argument is directly at odds with the regulations written by the agency charged with providing guidance on how local governments should implement ORMA. *See infra* § II. The Court of Appeals appropriately applied the plain language of Ecology's regulations, thereby reinforcing the manner in which public officers should continue to apply OMRA. *See infra* § II. There is no need for this Court to weigh in further.

II. The Court of Appeals Applied the Plain Language of Ecology's Regulations.

Quinault's petition for review is based on the presumption that ORMA applies to projects that could have downstream impacts on ocean

resources, even when those projects will not themselves occur on Washington's "coastal waters." This interpretation is inconsistent with Ecology's regulations, which clearly limit ORMA's reach to activities that are ocean-based. The Court of Appeals properly focused its analysis on Ecology's regulations, because Ecology is "charged with administering ORMA" and the agency's interpretation is entitled to "considerable weight." Opinion at 14 (citation omitted). But instead of directly challenging the regulations, which Quinault has never done and could not do for the first time on appeal,[1] Quinault's petition to this Court attempts to marry the regulations with Quinault's mistaken view of the statute by contorting the regulations beyond their reasonable meaning.

A. The Court of Appeals appropriately limited "ocean uses" to activities that are primarily ocean-based.

This case focuses on ORMA's requirement that local governments incorporate policies, guidelines, and project review criteria for "ocean uses" into their shoreline master programs. WAC 173-26-360(1); *see* RCW 43.143.010(1); RCW 43.143.030. Ecology carried out its statutory obligation to implement ORMA's purposes in part by defining "ocean uses," a term not defined by the statute, and providing examples of the types of activities that fall within the statute's scope. *See* WAC 173-26-360(1), (3), (6), (8)-(12). Accordingly, the regulations define "ocean uses" as:

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[1] Quinault insinuates that the Court of Appeals viewed Ecology's definition of "ocean use" as inconsistent with ORMA. Petition at 14 (citing Opinion at 16 n.8). The Court of Appeals did not make this holding, which it was never asked to do. Quinault cannot challenge the regulation for the first time on appeal. *See* RAP 2.5(a).

> [A]ctivities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters and includes their associated off shore, near shore, inland marine, shoreland, and upland facilities and the supply, service, and distribution activities, such as crew ships, circulating to and between the activities and developments. Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage. Ocean uses which generally involve sustainable use of renewable resources include commercial, recreational, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.

WAC 173-26-360(3).

The proposed projects at issue in this case—terminals constructed on land that will "receive crude oil from trains, put them into storage tanks, and . . . load the crude oil onto vessels"—do not fall within the definition of "ocean uses." Opinion at 16. As the Court of Appeals concluded, the movement of materials from land to water "is not an ocean use because it does not occur on Washington's coastal waters." Opinion at 16.

The Court of Appeals acknowledged that an "ocean use" may capture related projects on land, but only where there is "a primary activity that occurs on Washington's coastal waters to which these projects could be 'associated.'" Opinion at 16. Because neither Westway nor Imperium proposes to operate or control the vessels that call on their facilities, their projects do not involve a "primary activity occurring on Washington's coastal waters" and are not "ocean uses" subject to ORMA. Opinion at 16.

Giving effect to the meaning of the word "associated" in Ecology's definition of "ocean uses" does not, as Quinault argues, create a "new test" based on a "formalistic" view of the regulation. *See* Petition at 13. The mere fact that the terminals will service ocean shipping does not make the terminals "water-based" projects. *See* Petition at 13. As the Court of Appeals observed, the terminals are not ocean-based projects with a land-based component. Instead, they are land-based projects with associated vessel calls. *See* Opinion at 16 (citation omitted). Quinault's strained interpretation of the regulation would render this distinction irrelevant and read the term "associated" out of the definition. *See* Petition at 12-13. The Court of Appeals properly declined this request by holding that the "primary activity"—that other activities are "associated with"—must occur on Washington's coastal waters.

At base, Quinault's fundamental concern is that the "oil shipping" that is "intrinsic" to the Westway and Imperium projects will somehow escape review by local or state decision-makers. *See* Petition at 15. This concern holds no weight in light of the fact that, as Quinault acknowledges, local and state decision-makers are evaluating the potential environmental impacts of vessel transport associated with the Westway and Imperium projects under the State Environmental Policy Act ("SEPA") and Shoreline Management Act ("SMA"). *See* Petition at 15. Quinault has provided no explanation for why its expansive interpretation

of ORMA is necessary given the existing web of environmental review provisions under SEPA and the SMA.[2]

B. Terminals on land are not "transportation" uses.

The Court of Appeals properly concluded that facilities on land that are designed to move product between modes of transport are not themselves "transportation" uses under Ecology's regulations. The regulations define "transportation"—a term found nowhere in ORMA outside the statute's legislative findings[3]—as follows:

> Ocean transportation includes such uses as: Shipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports and airports. The following guidelines address transportation activities that originate or conclude in Washington's coastal waters or are transporting a nonrenewable resource extracted from the outer continental shelf off Washington.

WAC 173-26-360(12).

As the Court of Appeals held, "transportation uses" are not "separate activities to which permitting agencies must apply ORMA review criteria." Opinion at 18. Instead, where an "ocean use" exists, ORMA review criteria must also be applied to "transportation uses and activities" that are incidental to such ocean uses. Opinion at 18. Having

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[2] The SMA is designed to evaluate development of shorelines by ensuring that such development controls pollution and prevents damage to the natural environment and has consistently been applied to evaluating land use decisions involving onshore facilities. *See* RCW 90.58.020. Likewise, SEPA already ensures that probable significant, adverse impacts will be evaluated and mitigated before a project moves forward. *See* RCW 43.21C.031.

[3] The statute states that "[o]cean and marine-based industries and activities, such as fishing, aquaculture, tourism, and marine transportation have played a major role in the history of the state and will continue to be important in the future." RCW 43.143.005(2).

concluded that the terminals are not "ocean uses," the court reasonably determined that transportation incidental to the terminals does not independently trigger review criteria. Opinion at 17.

Quinault offers no explanation for why "ocean transportation" that is merely "incidental" to activities on land should nonetheless bring the shoreline activity within the purview of ORMA, despite Ecology's reasonable explanation to the contrary regarding its own regulation.[4] In fact, all of the other types of activities described in the regulations are indisputably examples of "ocean uses," because their primary activity is ocean-based: "ocean mining," meaning "mining . . . from the sea floor;" "ocean disposal," meaning "the deliberate deposition or release of material at sea;" "ocean research;" and "ocean salvage." Petition at 17 (citing WAC 173-26-360(9), (11), (13), (14)). These types of "ocean uses" stand in stark contrast to the land-based projects at issue in this case, where third parties will load vessels with crude oil that was extracted within the mainland. This argument underscores Quinault's failure to focus on the actual proposals at issue in this case: land-based terminals—not ships, regardless of what those ships are carrying or where they are carrying materials from.

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[4] Instead, Quinault characterizes Ecology's interpretation of its own regulation as a "post hoc litigation position" that is not entitled to deference. Petition at 19. The purported legal support that Quinault offers for this argument is a case that "emphasize[d] the narrowness of [its] holding" to a circumstance where two agencies authorized to interpret a statute differed over the meaning of an ambiguous regulation. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); Petition at 19. Such is not the case here.

The Court of Appeals also concluded that "the transportation of the crude oil and bulk liquids will originate on land at the extraction point and not in Washington's coastal waters." *Id.* at 17. As a result, the terminals fall outside the definition of "transportation activities that originate or conclude in Washington's coastal waters . . . ." Opinion at 20 (quoting WAC 173-26-360(12)).

Quinault takes issue with this holding, arguing that the Court of Appeals narrowed the regulations to "extraction activities, which are independently banned" by the explicit moratorium on leases for non-renewable resource exploration and "render[ed] the second half of the description of regulated transportation superfluous." *See* Petition at 18. This argument misunderstands the jurisdictional boundaries governing ocean-based activities, which ORMA and its implementing regulations fit within.

The first half of the "transportation" definition, like the entirety of the "ocean uses" definition," is limited to activities occurring in "coastal waters."[5] The term "coastal waters" includes the three-mile zone under state jurisdiction, which is the only area where the state could directly place a moratorium on leases for oil and gas exploration, development, or production.[6] The term also includes the 197-miles of the exclusive economic zone under federal jurisdiction.[7] The "adverse impacts" portion of ORMA works in tandem with the moratorium by reaching projects

[5] WAC 173-26-360(3), (12).
[6] RCW 43.143.010(2).
[7] RCW 43.143.020(2), (4).

involving the 197-mile area under federal jurisdiction—but nonetheless part of Washington's "coastal waters"—which the moratorium did not and could not cover given the limits of state jurisdiction.[8]

Addressing transportation activities that "originate or conclude" in Washington's "coastal waters" allows local decision-makers to address transportation activities that "originate or conclude" anywhere within the 200-mile zone off Washington—including the three-mile area within Washington jurisdiction and the 197-mile area within the exclusive economic zone that the "adverse impacts" criteria could reach.

Ecology's definition of "transportation" underscores that the agency, in carrying out its obligations under ORMA, was focused on capturing ocean-based activities involving ocean resources, regardless of whether these activities occurred on state waters or on the adjacent federally managed waters. Nothing in ORMA or its implementing regulations shows, however, that the legislature intended to inject a layer of review on land-based activities that are already covered by state and local laws.

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[8] *See* RCW 43.143.005(4). The "review criteria" that Quinault criticizes the Court of Appeals for overlooking indeed have a purpose outside the moratorium: reaching activities in the vast majority of Washington's coastal waters that are outside the state's jurisdiction, where the moratorium could not reach. These review criteria would apply to any exploration activities in the federally managed exclusive economic zone by virtue of the Coastal Zone Management Act ("CZMA"). *See* 16 U.S.C. § 1456(c)(1)(A) (directing that federal agencies conduct and support activities directly affecting the coastal zone in a manner which is, to the maximum extent practicable, consistent with approved state management programs); 16 U.S.C. § 1456(c)(3)(A) (providing that "any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program").

CONCLUSION

For the reasons set forth above, Westway requests that the Court deny Quinault's petition for review.

Respectfully submitted this 17th day of December, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on December 17, 2015, I caused the Response to Quinault Indian Nation, et al.'s Petition for Review in the above-captioned matter to be served upon the parties herein as indicated below:

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